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ATTORNEYS FOR PLAINTIFF

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF MONTANA**  
**BILLINGS DIVISION**

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HYUNDAI MOTOR FINANCE	)	No. CV-09-91-BLG-RFC-CSO
COMPANY,	)	
	)	
Plaintiff,	)	
	)	<b>COMPLAINT</b>
vs.	)	
	)	
R. NICK GUTIERREZ,	)	
	)	
Defendant.	)	

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Plaintiff, Hyundai Motor Finance Company (“HMFC”), by and through its counsel of record, Holland & Hart LLP, for its Complaint states and alleges as follows:

## **PARTIES**

1. Plaintiff, Hyundai Motor Finance Company (“HMFC”) is a California corporation with its principal place of business at 10550 Talbert Avenue, Fountain Valley, California, 92078. HMFC is a lender that provides financing in the automotive industry, including, *inter alia*, “floor plan” financing for automobile dealers.

2. Defendant R. Nick Gutierrez is an individual residing in Billings, Montana, was the majority owner of Incredible Auto Sales, LLC, d/b/a Incredible Kia (“Incredible Kia”), and is the guarantor of Incredible Kia’s obligations under the “Loan Agreement” described herein.

## **JURISDICTION**

3. Jurisdiction is properly before this Court pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and this matter involves more than \$75,000 in controversy.

## **VENUE**

4. The venue of this matter is properly in the District of Montana because the Defendant resides in Billings. This case is properly filed with the Billings Division pursuant to L.R. 1.11(a)(1) and Mont. Code Ann. §§ 25-2-118 and -121.

### **FACTS COMMON TO ALL COUNTS**

5. On July 27, 2005, HMFC provided Incredible Kia a “floor plan” operating line of credit. The line of credit is governed by an “Inventory Loan and Security Agreement” signed by HMFC and R. Nick Gutierrez on behalf of Incredible Kia, and dated July 27, 2005 (the “Loan Agreement”). Exhibit 1 hereto is a true, correct and complete copy of the Loan Agreement.

6. Other terms of the Loan Agreement, including the applicable interest rates, are provided in a separate “Inventory Loan and Security Agreement Interest Rate and Charges Addendum” dated July 27, 2005, and signed by HMFC and R. Nick Gutierrez on behalf of Incredible Auto Sales, LLC (the “Addendum”). A true, correct, and complete copy of the Addendum is attached hereto as Exhibit 2.

7. Among other terms, the Loan Agreement granted HMFC a security interest in substantially all of the assets of Incredible Kia, including motor vehicle inventory. HMFC’s security interest in the collateral was perfected by the filing of three separate financing statements with the Montana Secretary of State’s Office.

8. In mid-October of 2006, HMFC learned that Incredible Kia had breached the terms of the Loan Agreement by selling vehicles out of trust,

by “double-flooring” vehicles with other lenders, and by altering funding information for vehicles.

9. On October 17, 2006, Incredible Kia filed a petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court, District of Montana, as case no. 06-60855-RBK (the “Bankruptcy Case”). On January 24, 2007, the Bankruptcy Court confirmed a sale of certain assets of Incredible Kia pursuant to 11 U.S.C. § 363, most of the proceeds of which were paid to HMFC. (*In re Incredible Auto Sales, LLC*, Cause No. 06-60855-RBK, dkt. #243.) Thereafter, other items of HMFC’s collateral were liquidated and their proceeds applied to the HMFC loan.

10. By virtue of its actions described above, Incredible Kia defaulted on the Loan Agreement.

11. Upon filing of the Bankruptcy Case, HMFC was owed approximately \$2,243,608.82. Following the liquidation of all assets of Incredible Kia, approximately \$173,461.01 in principal and interest remains unpaid under the Loan Agreement, as of May 2008. Interest continues to accrue at the annual rate, calculated on the basis of a 365 day year and the actual number of days elapsed, established in the Interest Rate and Charges Addendum in effect between HMFC and Incredible Kia (see Exhibit 2).

Additionally, HMFC expended approximately \$142,137 in attorneys fees, costs, and other expenses in connection with preserving its collateral in connection with the Incredible Kia bankruptcy.

**COUNT I - PERSONAL GUARANTY**

12. Plaintiff restates and realleges all preceding paragraphs as though set forth fully herein.

13. Defendant R. Nick Gutierrez personally guaranteed Incredible Kia's obligations under the Loan Agreement. Exhibit 3 hereto is a true, correct, and complete copy of the Continuing Guaranty and Subordination Agreement dated July 27, 2005 (the "Personal Guaranty").

14. Under the terms of the Personal Guaranty, R. Nick Gutierrez is personally liable for repayment of Incredible Kia's debt to HMFC.

15. HMFC has demanded payment under the Personal Guaranty but R. Nick Gutierrez has failed to make such payment.

16. HMFC is entitled to judgment against R. Nick Gutierrez in the amount of at least \$315,598.01 plus interest and attorneys fees and costs.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for the following:

A. For judgment against R. Nick Gutierrez owing under the Incredible Kia Loan Agreement, including accrued interest, costs, and

attorney fees, in the amount of at least \$315,598.01, plus interest hereafter at the contractual annual rate and attorneys fees and costs until paid in full.

B. For such other and further relief as the Court deems appropriate.

Dated this 21st day of July, 2009.

/s/ Shane P. Coleman

Shane P. Coleman

**ATTORNEYS FOR PLAINTIFF**

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